

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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| In the Matter of |) | |
| |) | |
| Connect America Fund |) | WC Docket No. 10-90 |
| |) | |
| A National Broadband Plan for Our Future |) | GN Docket No. 09-51 |
| |) | |
| Establishing Just and Reasonable Rates for Local Exchange Carriers |) | WC Docket No. 07-135 |
| |) | |
| High-Cost Universal Service Support |) | WC Docket No. 05-337 |
| |) | |
| Developing an Unified Intercarrier Compensation Regime |) | CC Docket No. 01-92 |

COMMENTS OF

THE FREE STATE FOUNDATION*

These comments are submitted in response to the Commission's proposed action to address arbitrage opportunities and incentives created by the existing intercarrier compensation (ICC) system. The Commission proposes certain short-term fixes while simultaneously undertaking long-term efforts to reform the Universal Service Fund (USF) and ICC systems. This Commission should adopt such rules in order to prevent ongoing abuses of the ICC system. But the Commission must do so in a swift manner that will enable it to more clearly focus on the pressing need for comprehensive reform of the USF and ICC systems.

* These comments express the views of Randolph J. May, President of the Free State Foundation and Seth L. Cooper, Research Fellow of the Free State Foundation. The views expressed do not necessarily represent the views of others associated with the Free State Foundation. The Free State Foundation is an independent, non-profit free market-oriented think tank.

The record established by the Commission demonstrates that "phantom traffic" and "access stimulation" (or "traffic pumping") are serious problems that hinder the ability of inter-exchange carriers and wireless carriers to deliver services to consumers in an efficient and affordable manner. As an interim measure, the Commission should adopt clear rules that will best limit such arbitrage opportunities under the existing ICC system. In so doing, however, the Commission should continue to recognize that such rules are only patches on a broken ICC system.

Adopting quick-fix rules to address ICC arbitrage problems will likely reduce waste and inefficiencies. However, such rules must be viewed not simply as ends in themselves, but rather primarily as a means of removing obstacles in the path of larger ends: Systematic reform of the USF and ICC systems.

The Commission proposes to adopt rules to regarding phantom traffic because "[t]he current disparity of intercarrier compensation rates gives service providers an incentive to misidentify or otherwise conceal the source of traffic to avoid or reduce payments to the terminating service provider."¹ Based on its record, the Commission has reached a sound conclusion that "traffic lacking sufficient information to enable proper billing of intercarrier compensation charges is not consistent with the public interest, and rules are needed to address this problem."² And its proposal for "modifying the Commission's rules to require that the calling party's telephone number be provided by the originating service provider and to prohibit the stripping or altering call signal information" is also sensible.³

¹ FCC, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, In the Matter of Connect America Fund, et al., WC Docket No. 10-90, GN Docket No. 09-51, WC Docket No. 07-135, WC Docket No. 05-337, CC Docket No. 01-92, CC Docket No. 96-45, WC Docket No. 03-109 (released February 9, 2011), at 198, para 620.

² *Id.* at 201, para 624.

³ *Id.* at 201, para. 626.

The Commission should consider adopting its rules as background defaults that carriers dealing in arms-length negotiations can expressly alter by contract. This would make any such rules consistent with the Commission's stated intention to balance the desire to resolve billing disputes with its stated reluctance to regulate in areas where industry self-resolution is effective.⁴ Adopting default rules that can be altered by contracting carriers would also fit with the Commission's stated purpose of adopting forward-looking and technologically neutral rules.⁵ The Commission contends that "[t]hese proposed rules are not intended to affect existing agreements between service providers regarding how to 'jurisdictionalize' traffic in the event that traditional call identifying parameters are missing, as long as such agreements are consistent with Commission rules or other legal requirements."⁶ A default rules approach may best ensure such rules do not infringe on the obligation of existing agreements between carriers.

The Commission also proposes to adopt rules to regarding access stimulation because "the ability to engage in this arbitrage arises from the current access charge regulatory structure as it applies to LEC origination and termination of interstate and intrastate calls."⁷ It reasonably concludes that "payments made by a LEC pursuant to an access stimulation arrangement are not properly included as costs in the incumbent LEC's interstate switched access revenue requirement."⁸ And the Commission proposes rules incorporating a sensible trigger-based approach. Whenever a rate-of-return LEC or a competitive LEC is a party to an existing access revenue sharing agreement or enters into a new access revenue sharing agreement,⁹ such an agreement triggers new tariff eligibility and filing requirements – depending on the nature of the

⁴ *Id.* at 198, para. 620.

⁵ *Id.* at 198, para. 620.

⁶ *Id.* at 203, para. 632.

⁷ *Id.* at 204, para 635.

⁸ *Id.* at 213, para 661.

⁹ *Id.* at 212, para. 659.

carrier involved.¹⁰ This trigger-based approach constitutes a worthwhile attempt to ensure that carriers engaged in access stimulation do not continue to take advantage of the existing interstate access charge regime by confounding the underlying assumptions of the system.

The Commission should reject short-sighted claims that access stimulation arbitrage provides public benefits because such claims ignore costs that may be hidden but are no less real.¹¹ As the Commission itself rightly recognizes, "[a]lthough long distance carriers are billed for and pay for minutes associated with access stimulation schemes, all customers of these long distance providers bear these costs and, in essence, ultimately support businesses designed to take advantage of today's above-cost intercarrier compensation system."¹²

The Commission insists that "[s]ince 2007, the record indicates that access stimulation activity by rate-of-return LECs has decreased" and focuses primarily on access stimulation schemes involving "competitive LECs using the rural exemption, whose interstate access rates are benchmarked to the NECA tariff rates."¹³ However, the Commission should also take seriously concerns over access stimulation involving intraMTA calls terminated by competitive LECs that seek to obtain additional revenue from reciprocal compensation payments. And the Commission should consider adopting rules that address any incentives for access stimulation in such circumstances. Importantly, because wireless carriers have expressed confusion regarding the meaning and force of the Enforcement Bureau's 2009 *North County* decision,¹⁴ the Commission should clarify the obligations and expectations of carriers regarding such traffic. Arbitrage activities are more likely to continue in a climate of legal and administrative uncertainty.

¹⁰ *Id.* at 212, para. 659.

¹¹ *Id.* at 219, para. 676.

¹² *Id.* at 205, para 637.

¹³ *Id.* at 211, para 657; *id.* at 209, para. 650.

¹⁴ *See id.* at 218, para. 673; *id.* at fn. 1059 (cite omitted).

The paramount need to overhaul the USF and ICC systems must be the overarching aim of the Commission as it addresses these interim fixes to the ICC system. Reducing the incidents of ICC arbitrage is undoubtedly important. But making tweaks to the broken ICC system is no substitute for the broader reform project that the Commission must undertake. The real test of any interim steps taken by the Commission in this proceeding is the extent to which they can be undertaken rapidly and help facilitate the larger, overall process of modernizing and reforming the USF and ICC systems. We will offer our insights into principles that should guide comprehensive USF and ICC reforms later in this proceeding.

Respectfully submitted,

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April 1, 2010